No. 77-946

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN IANNONE AND IRVING ALBAHARI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

Cases:

Cases—Continued

Statutes and rule:

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OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. 29-31). The opinion of the district court denying petitioners' motion to suppress is reported at 423 F. Supp. 908.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1977, and a petition for rehearing was denied on December 5, 1977. The petition for a writ of certiorari was filed on January 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was a delay in sealing the recording of a court authorized wire interception of petitioner Iannone's conversation.

2. Whether the failure to rearraign petitioner Albahari upon the return of a superseding indictment constituted reversible error.

3. Whether the jury instructions were proper.

4. Whether the evidence showed multiple conspiracies.

STATUTES INVOLVED

18 U.S.C. 1955 provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> * * * * *
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; * * *
>
> * * * * *

18 U.S.C. 2518(8)(a) provides:

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be

> done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. * * * The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners, along with others,[1] were convicted of engaging in an illegal gambling business, in violation of 18 U.S.C. 1955, and conspiracy to commit that offense, in violation of 18 U.S.C. 371. Petitioner John Iannone was sentenced to concurrent terms of imprisonment for one year and one day. Petitioner Irving Albahari was sentenced to concurrent terms of two years' imprisonment, with 18 months suspended. The court of appeals affirmed without opinion.

1. The evidence at trial showed that from October 1974 until November 1975 Richard Esposito super-

[1] Co-defendants Joseph Falco and David Steinberg were also convicted at the joint trial. Co-defendants Richard Rizzo, Richard Esposito, Louis Maggio, and Nicholas Renna pleaded guilty to the substantive charge. Co-defendants John Yarmosh, Nicholas Botta, and Lawrence Messina pleaded guilty to the conspiracy charge.

vised an illegal gambling business known as the "Dixon Operation," which handled sports wagers in amounts of $300,000 to $1,000,000 a week (Tr. 58–59, 123–124, 276–277).[2] The wagers were transmitted by telephone to wireroom clerks located at various apartments in Manhattan (Tr. 125, 269–270). Petitioners were employed as runners; their duties were to induce bettors to place wagers with the operation, collect debts, and pay out winnings (Tr. 60–62, 101–105, 122, 265–274). In late December 1974, Robert Breindel arranged for petitioner Albahari to operate his own wireroom (Tr. 135–136).

In order to avoid the possibility of substantial losses, the Dixon Operation regularly laid off excess bets to the "National Operation," run by Joseph Falco, the "Commander I Operation," run by Nicholas Renna, and the "Mr. White Operation," run by Nicholas Botta, Lawrence Messina, and Joseph Yarmosh (Tr. 129–135, 277–278, 410–430).

2. Much of the evidence at trial was derived from court-authorized electronic surveillance. The first court order, authorizing electronic surveillance for 20 days unless the objective of the surveillance was attained sooner, was entered on June 11, 1975 (H. Ex. 1; H. Tr. 5–6).[3] A number of gambling-related conversations

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[2] Robert Breindel, a prosecution witness, was also involved in supervision of the Dixon Operation until he was arrested by local law enforcement officials in January 1975 (Tr. 58–59).

[3] "H. Tr." refers to the one volume transcript of the pretrial hearing held on December 20, 1976. "H. Ex." refers to exhibits introduced at that hearing.

were intercepted between June 11 and June 15, 1975 (H. Tr. 7).[4] On June 14, 1975, conversations were intercepted in which bettors were advised that the wireroom would be moved two days later (H. Tr. 8–9). No conversations were intercepted on June 16 and 17, and the supervising attorney was informed of the apparent change in location of the wireroom to a nearby location (H. Tr. 11, 87–88).

The wireroom had changed location on a previous occasion, and there was no indication that the move was permanent (H. Tr. 8–18). The FBI agent in charge of the surveillance was aware that it is customary to continue to accept wagers in a vacated wireroom from bettors who are uninformed of the gambling operation's new location (H. Tr. 12–13). The agent also knew that gambling related calls other than bets are often made from abandoned wirerooms (H. Tr. 12–13). Therefore, the FBI agent and the supervising attorney decided to continue the electronic surveillance (H. Tr. 88). No significant activity occurred in the old wireroom, and the surveillance was discontinued on June 23, 1975 (H. Tr. 15, 92–95). The authorizing judge was unavailable that day; the tapes were therefore sealed on the following day (H. Tr. 15,

[4] These conversations included one in which petitioner Iannone participated. Petitioner Albahari was identified by Breindel as a member of the operation but was not overheard during either interception.

80–81). The parties stipulated that the original tape recordings were not altered or edited in any way prior to sealing (H. Tr. 101–105).[5]

ARGUMENT

1. Petitioners claim (Pet. 10–18) that the tapes of the interception conducted pursuant to the court order of June 11, 1975, should have been suppressed because of a delay in sealing them. But 18 U.S.C. 2518(8)(a) directs that tapes of intercepted conversations are to be presented to the issuing judge for sealing "[i]mmediately upon the expiration of the * * * order." The order involved here authorized interception for 20 days, or until the objective of the investigation was achieved (H. Ex. 1). Surveillance was terminated on June 23, 1975, when it became evident that it was no longer effective, and the tapes were sealed on June 24. The order did not expire by its terms until July 1, 1975. There was thus no delay in sealing the tapes. Petitioner's contention that there was an eight-day delay is apparently based on the erroneous assumption that the objective of the investigation was achieved by June 16, when the wire-room moved to the new location. Instead, as the super-

[5] Electronic surveillance was also conducted at various locations pursuant to a second court order. Petitioners do not discuss any claims relating to that surveillance, in which neither was overheard. They do, however, adopt the arguments in the petition for certiorari filed by their co-conspirators Yarmosh, Botta, and Messina (Pet. 4). That petition (No. 77–135), which was denied on November 14, 1977, raised claims relating to the second surveillance. We are sending petitioners copies of our brief in opposition in No. 77–135, upon which we rely.

vising attorney testified, the decision to terminate the interception was based on the conclusion a week later that "the investigative objectives of [the June 11 order] could not be reached" by continued interception of the target phones (H. Tr. 92). Cf. *United States* v. *Ricco*, 421 F. Supp. 401, 406–407 (S.D. N.Y.).

Even assuming that the tapes should have been sealed immediately after the last gambling-related call was intercepted on June 15, the agents' decision that the interception should be continued because of the possibility that the phones might continue to be used for gambling-related purposes was reasonable and constituted the "satisfactory explanation" for the brief delay in sealing required by Section 2518(8)(a), as the district court concluded (H. Tr. 115). The court's resolution of this primarily factual question is consistent with the manner in which other courts have applied the sealing requirement in cases involving brief delays.[6]

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[6] The Seventh Circuit has upheld delays of 9 and 38 days in sealing to permit clarification of portions of duplicate tapes found to be inaudible during transcription (*United States* v. *Angelini*, 565 F. 2d 469 (C.A. 7), petition for a writ of certiorari pending, No. 77–938). The Fifth Circuit has upheld a five-day delay in sealing during which time the tape recordings were transcribed (*United States* v. *Cohen*, 530 F. 2d 43 (C.A. 5), certiorari denied, 429 U.S. 855), and a 14-day delay where "[t]he government accounted for the delay by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants" (*United States* v. *Sklaroff*, 506 F. 2d 837, 840–841 (C.A. 5), certiorari denied, 423 U.S. 874). The Second Circuit has upheld a

United States v. *Gigante*, 538 F. 2d 502 (C.A. 2), upon which petitioners rely (Pet. 12–17), is clearly distinguishable. In that case, the delays in sealing ranged from eight months to more than a year, the government offered "no explanation whatsoever" for the delays (538 F. 2d at 504), and "haphazard procedures" were followed in handling the tapes (*id.* at 505). There is absolutely no reason to doubt that, if confronted with similar circumstances, the panel that decided this case would, like the court in *Gigante*, have held that suppression was proper.[7]

2. The original indictment returned on November 22, 1976, named petitioner Albahari and included the alias "Brooklyn." Petitioner Albahari was arraigned less than two weeks later. A superseding indictment was filed on January 31, 1977, in which the

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seven-day sealing delay that was primarily the result of the government attorney's preparations for trial (*United States* v. *Scafidi*, 564 F. 2d 633, 641 (C.A. 2), petitions for a writ of certiorari pending, Nos. 77–1002, 77–1003, 77–1004, 77–6026, 77–6035, 77–6165), and six and thirteen day delays caused by efforts to have the issuing judge, instead of another judge, seal the tapes (*United States* v. *Fury*, 554 F. 2d 522, 533 (C.A. 2), petition for a writ of certiorari pending, No. 76–6828; *United States* v. *Poeta*, 455 F. 2d 117 (C.A. 2), certiorari denied, 406 U.S. 948). (The interceptions involved in *Fury* and *Poeta* were conducted pursuant to New York law. The sealing requirement of the state statute does not differ materially from that of 18 U.S.C. 2518(8)(a). See *United States* v. *Fury*, *supra*, 554 F. 2d at 533; see also 18 U.S.C. 2516(2). The tapes here were sealed on June 24, rather than June 23, because the issuing judge was not available on the 23d (H. Tr. 15, 80–81).

[7] Even if this case were inconsistent with *Gigante*, such an intra-circuit conflict would be for the court of appeals to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

name "Brooklyn" was deleted.[8] Petitioner Albahari claims (Pet. 22–26) that the trial court lacked jurisdiction to try him since he was not arraigned on the superseding indictment.

However, lack of formal arraignment is not reversible error unless prejudice is shown. *Garland* v. *Washington,* 232 U.S. 642, 645; *United States* v. *Rogers,* 469 F. 2d 1317 (C.A. 5).[9] At trial, when petitioner's counsel moved to dismiss the indictment for failure to rearraign petitioner, he conceded that he knew of the superseding indictment (Tr. 465). Indeed, the trial court concluded that counsel was "fully aware that there was a superseding indictment" (Tr. 466). In these circumstances, petitioner was not prejudiced by the absence of a formal rearraignment.[10]

3. Petitioners urge (Pet. 18–22) that the jury instructions were insufficient because they failed to identify the five persons alleged to have been involved in the violation of 18 U.S.C. 1955. They assert that, since there were only four defendants, and since Section 1955 applies to participation in an illegal gambling business that "involves five or more per-

[8] Petitioner incorrectly states (Pet. 7–8) that the alias "AC" was inserted in the superseding indictment.

[9] *Crain* v. *United States,* 162 U.S. 625, upon which petitioner relies (Pet. 26), was overruled by *Garland* v. *Washington, supra.*

[10] Petitioner Albahari asserts (Pet. 24) that he was prejudiced because he had attempted on cross-examination to establish that he was not "Brooklyn." But the fact that petitioner may have asked unnecessary questions on cross-examination does not demonstrate prejudice. The original indictment contained Albahari's real name, and Breindel identified him by that name (Tr. 102).

sons," the jury may have disagreed concerning the identity of the other participants in the business. But jury unanimity concerning the identity of the other participants in the business was not required. The court correctly instructed the jury that the participation of five or more persons in the business was an essential element of the crime that the government was required to prove beyond a reasonable doubt (Tr. 568–569, 587–588) and defined the type of participation required to bring an individual within the prohibition of Section 1955 (Tr. 587–588). Finally, it emphasized that each count and each defendant was to be considered separately, and that the jury was to return a verdict of guilty only if it unanimously concluded that the government had proved the essential elements of the crime charged by the required degree of proof (Tr. 604–605). Under these instructions, the jury could not have reached its guilty verdicts unless it was unanimously convinced that each defendant had participated in an illegal gambling business involving at least five persons.[11] That is all that is necessary to establish a violation of Section 1955, and any jury disagreement about the identities of the other participants in the enterprise was irrelevant. Cf. *United States* v. *Friedman*, 445 F. 2d 1076, 1084 (C.A.

[11] In fact, as the district court noted (Tr. 596), the scope and size of the Dixon Operation was not seriously challenged; instead, each defendant simply asserted that he was not a participant. Indeed, two confessed participants in the operation, Breindel and Daniel Kramer, testified at trial.

9), certiorari denied *sub nom. Jacobs* v. *United States,* 404 U.S. 958.[12]

In any event, petitioners' failure to object to the instructions concerning the number of participants or to request any further instructions—which is not surprising in light of the fact that the size of the enterprise was not seriously contested—bars their present claim. Rule 30, Fed. R. Crim. P.; *United States* v. *Bermudez,* 526 F. 2d 89, 97 (C.A. 2), certiorari denied, 425 U.S. 970; *Vitello* v. *United States,* 425 F. 2d 416, 423 (C.A. 9), certiorari denied, 400 U.S. 822.

4. Petitioners' final contention (Pet. 26–28), that the evidence showed multiple conspiracies, is also without merit and is wholly inappropriate for review by this Court. Petitioners claim that the evidence showed only that there were separate enterprises that "from time to time" laid off bets to each other. It is clear, however, that the gambling business prohibited by 18 U.S.C. 1955 includes those who regularly accept lay off bets. *E.g., United States* v. *DiMuro,* 540 F. 2d 503, 508 (C.A. 1), certiorari denied, 429 U.S. 1038; *United States* v. *Box,* 530 F. 2d 1258, 1265–1266 (C.A. 5); *United States* v. *Schaefer,* 510 F. 2d 1307, 1312 (C.A. 8), certiorari denied, 421 U.S. 975, 978. The jury was twice instructed that "[w]hether a person accepting layoff bets knowingly associates himself with

[12] The cases upon which petitioners rely (Pet. 19–22) are inapposite, since they involve instructions that permitted the jury to return a guilty verdict on an erroneous legal theory. There is no such problem here.

the conspiracy * * * is a question of fact for you to decide" (Tr. 574, 611). Each time, the court carefully explained the factors relevant to that determination. Petitioners do not challenge these instructions; this Court need not review the jury's factual conclusion that the evidence showed a single conspiracy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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